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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

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5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
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13
14 BEFORE: THE HONORABLE RYA W. ZOBEL
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17 **HEARING ON MOTION TO DISMISS**
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19
20 John Joseph Moakley United States Courthouse
21 Courtroom No. 12
22 One Courthouse Way
23 Boston, MA 02210
24

25
June 18, 2014
3:00 p.m.

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Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 5205
Boston, MA 02210
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and CHRIS J. TARDIO, ESQ., 315 Deaderick Street, Suite 1100,
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on June 18, 2014.)

THE COURT: Good afternoon. Please be seated.

COURTROOM DEPUTY CLERK URSO: This is In re: New England Compounding, MD-13-2419.

THE COURT: For the plaintiffs, who is here?

MS. MacAULEY: Jessica MacAuley.

THE COURT: Ms. MacAuley?

MS. MacAULEY: Yes. Hagens, Berman, Sobol, Shapiro, lead counsel.

MR. CHALOS: Good morning, your Honor -- good afternoon, your Honor. Mark Chalos for the plaintiffs' steering committee.

MR. STRANCH: Good afternoon, your Honor. Gerard Stranch on behalf of the plaintiffs' steering committee.

MR. CLAYTON: Good afternoon. Daniel Clayton with the plaintiffs' steering committee.

THE COURT: Okay.

MR. NOLAN: Your Honor, I'm George Nolan from Nashville also here for the PSC.

THE COURT: I'm sorry. You're for whom?

1 MR. NOLAN: With the plaintiffs' steering committee.

2 THE COURT: Oh, plaintiffs.

3 MR. GASTEL: Good afternoon, Judge. Ben Gastel, also
4 here for plaintiffs' steering committee.

5 MR. COREN: Good afternoon, your Honor. Michael
6 Coren, co-chair of official creditor's committee, but today
7 I'll be here wearing my plaintiffs' hat on the Premier motions
8 in front of you.

9 THE COURT: Premier is the New Jersey?

10 MR. COREN: Yes, your Honor.

11 MR. MARTIN: Your Honor, Thomas Martin, also here for
12 the plaintiffs' motion, on the Premier motion.

13 THE COURT: Now we go over to this side.

14 MS. GREER: Your Honor, Marcy Greer for the Saint
15 Thomas entities and the Ascension parties.

16 THE COURT: Greer for Saint Thomas?

17 MS. GREER: Yes, your Honor, and the Ascension
18 parties.

19 MS. PUIG: Same, your Honor. Yvonne Puig, lead
20 counsel for the Saint Thomas entities and the Ascension
21 entities.

22 THE COURT: I'm sorry. Your last name is?

23 MS. PUIG: Yvonne Puig, P-u-i-g, your Honor.

24 THE COURT: Thank you.

25 MS. PUIG: Thank you.

1 MS. KELLY: Your Honor, Sarah Kelly for the Saint
2 Thomas entities and the Ascension parties.

3 MR. GIDEON: Your Honor, C.J. Gideon on behalf of
4 Saint Thomas Outpatient Neurosurgical Center, Howell Allen
5 Clinic, John Culclasure, Debra Schamberg, Specialty Surgery
6 Center, Ken Lister, M.D., and Kenneth Lister, M.D., PC, along
7 with Chris Tardio from my office.

8 MR. TARDIO: Good afternoon, your Honor.

9 THE COURT: Your last name?

10 MR. TARDIO: Tardio, T-a-r-d-i-o.

11 MR. BLUMBERG: And I'm Jay Blumberg from the firm of
12 Blumberg & Wolk on behalf of the Premier defendants in New
13 Jersey.

14 THE COURT: That's it?

15 Now, is everybody who announced his or her name going
16 to argue?

17 MR. STRANCH: I don't believe so, your Honor. I
18 think you just got to meet everybody today.

19 THE COURT: I'm happy to meet everybody.

20 Could I have a show of hands as to who is going to
21 argue? You're kidding?

22 MR. STRANCH: It's only half of us.

23 THE COURT: Well, let me first apologize for this
24 constantly-changing time. What happened was that a defendant
25 decided not to plead and go to trial instead. So, we finished

1 the criminal trial this morning and the jury is out, which may
2 be yet another interruption since they should have had a
3 verdict long ago, and we also have a couple of other criminal
4 cases that are waiting in the wings.

5 So, I do not think that I could even give 15 minutes
6 to each of you and I hope that you will make some arrangements
7 so that we can finish within an hour or so all of your
8 arguments. If you need to talk to each other, do that and
9 tell me how long each of you is going to be or we'll simply
10 start. To the extent -- yes.

11 MR. STRANCH: From the PSC's perspective, we've
12 already divided that up, your Honor, and that's fine with us.

13 THE COURT: So, how much are all of you going to take
14 together?

15 MR. STRANCH: I think we can do it in half an hour or
16 less, all of us.

17 THE COURT: I mean, I assume that the plaintiffs'
18 arguments are substantially identical, no matter who the
19 defendant is. That is, there are no more separate plaintiffs
20 who have different arguments from --

21 MR. STRANCH: That's correct, your Honor.

22 THE COURT: Okay. Now, with respect to the
23 defendants, I think that the major ones are Saint Thomas and
24 Ascension. Premier is sort of a little less, I think.

25 MR. BLUMBERG: I don't know what you mean by "a

1 little less," but there are different issues.

2 THE COURT: There are different issues.

3 (Discussion off the record.)

4 THE COURT: So, I think we'll start with the Saint
5 Thomas defendants. So, how much time will you take
6 collectively?

7 MS. GREER: The Saint Thomas entities and the
8 Ascension parties will take -- together with the Tennessee
9 clinic defendants will take -- 25 minutes?

10 MR. GIDEON: Yes.

11 MS. GREER: 25 minutes, and Premier will take five.

12 THE COURT: Okay. So, who will start?

13 MS. GREER: Your Honor, I'll be prepared to start for
14 the Saint Thomas entities and the Ascension parties.

15 THE COURT: Right. I think it is appropriate for
16 counsel who argue to do so seated because the microphone
17 doesn't reach high enough and the people who are on the phone
18 elsewhere can't hear you unless you speak directly into the
19 microphone. Okay?

20 MS. GREER: That's fine.

21 THE COURT: So, at least you can be comfortable.

22 MS. GREER: Thank you, your Honor.

23 THE COURT: All right. Ms. Greer, you may begin.

24 MS. GREER: Your Honor, if I may, I'd like to start
25 with the Saint Thomas entities' motion. The Ascension

1 parties' motion keys off of that and provides additional
2 grounds for the motion to dismiss.

3 I have handed up to the Court a schematic drawing of
4 an organizational chart that I think will be helpful to
5 guide -- yes, your Honor -- to guide our discussion. I've
6 provided it to the other parties as well. It just simply
7 reflects the corporate structure that is in play here.

8 We have some additional arguments as to why Tennessee
9 law would not impose liability upon the Tennessee clinic
10 defendants, which is the basis for our vicarious liability.

11 THE COURT: This is the healthcare law?

12 MS. GREER: The healthcare law and the -- exactly.
13 And our co-defendants are going to address that. So, rather
14 than duplicate that presentation, I'm going to focus just on
15 the allegations that defeat vicarious liability.

16 So, looking at this chart, just to understand
17 schematically, because it helps me visually, what the
18 plaintiffs are trying to accomplish and must accomplish here
19 in order to have a claim for vicarious liability against any
20 of the parties that I represent. They have to break through
21 this dotted red line (indicating), which is based solely on a
22 50 percent ownership of the STOPNC clinic by Saint Thomas
23 Network.

24 THE COURT: Is that because the two entities on the
25 right side of the paper are the only operating ones, if you

1 will? That is the ones who had something to do with the
2 injections.

3 MS. GREER: That's correct, your Honor. STOPNC was
4 the entity that administered the injections. None of my
5 clients injected MPA. None of them ordered it or bought it
6 from NECC. Howell Allen is the other 50 percent owner of
7 STOPNC and that's why they have a 50 percent dotted line as
8 well.

9 THE COURT: So, they also had nothing to do with
10 injecting anybody?

11 MS. GREER: I'll let them address that. They are
12 involved with the clinic on more of a day-to-day basis.

13 Their employees, Dr. Culclasure and Nurse Schamberg,
14 were also directors, medical and health directors of the
15 clinic. So -- but none of our employees cross over to this
16 entity right here (indicating).

17 And I think there are a couple of things that are
18 really important to understand from the outset, and I'm sure
19 the Court read our papers and understands our position, but
20 one is that Saint Thomas Network is not a 100 percent owner.
21 It is a 50 percent owner, which means, by definition, it does
22 not have legal control over this entity. Very different from
23 a lot of the alter ego cases that I'm sure the Court has seen
24 where you've got a principal that either owns or completely
25 dominates the other entities such that piercing the corporate

1 veil would be appropriate.

2 Another feature of this particular scenario --

3 THE COURT: Excuse me.

4 Are these companies on the left operating companies
5 of one kind or another or are they simply -- is it simply a
6 holding company?

7 MS. GREER: Well, at the top of the chain is a
8 holding company in it, but then there are operating companies
9 as well. So -- but they are all nonprofit entities and that's
10 another unusual feature of this.

11 Usually when you're piercing the corporate veil, it's
12 for-profit entities or individuals who are taking money out of
13 the company where the veil is sought to be pierced, and here
14 we've got a Tennessee for-profit LLC, STOPNC, and they're
15 trying to pierce the veil up to each one of these entities on
16 this side of the equation, and to go through each chain they
17 have to produce evidence and to start they have to have
18 specific allegations, allegations that would suffice under
19 Tennessee law, and Tennessee law is very strong on alter ego.
20 It respects corporate separateness. When companies are
21 separately incorporated and separately run, you have to show
22 quite a bit to get past their separate corporate veils.

23 And we've cited to the Court the law. It's not
24 different from a lot of states, but it is very strong and
25 there is a presumption against it, and to start again, they

1 have to allege certain things.

2 THE COURT: What does the not-for-profit part add to
3 this?

4 MS. GREER: Well, I can't state a principle of law
5 that supports not for finding alter ego against a nonprofit.
6 Certainly it can be done, but I will submit to you that just
7 on the number of cases I've read throughout the country, it's
8 very rare because the objectives are different. We've got
9 companies that are non-profits based in faith-based
10 ministries. That is what they do. They are not trying to
11 make a profit or pull money out of STOPNC or anything else.
12 It's an investment that they have had and based on that, the
13 plaintiffs are trying to push all of the liability up to these
14 five entities (indicating).

15 And our -- the reason we're here today is to test the
16 viability of those allegations, because there are cases, like
17 the *Edmonds* case that we cited, that say the kinds of
18 allegations that they're making are not enough to support a
19 verdict under Tennessee law.

20 So, to take that a step back to where we are at the
21 pleading stage, if those allegations if proved would not
22 support a verdict against my clients, then they should be
23 dismissed at this stage because this is a very, very expensive
24 proposition for our clients to be in an MDL and to have
25 discovery. It's a very complicated and drawn-out process and

1 our position is we shouldn't be here. We didn't have anything
2 to do with these injections. We didn't have anything to do
3 with procuring the MPA from NECC, and we're only in it on
4 these vicarious liability claims and agencies. So, we want to
5 really have the Court take a deep look at this because the
6 kinds of things that they're alleging -- again, I'm going to
7 focus on the Saint Thomas entities first -- are things like a
8 common name.

9 Well, Saint Thomas is a pretty famous name. I
10 thought at one point about looking up how many entities in the
11 United States are called Saint Thomas that are based in
12 healthcare and I stopped because it was going to take too much
13 time, but it is a very common name.

14 The fact that there is some common ownership is not
15 enough. That has never been sufficient to pierce the veil.
16 It is an extraordinary remedy, to be used sparingly when the
17 corporate form has been misused, and that's what I will submit
18 to you, your Honor, is conspicuously absent from these
19 pleadings, is allegations that would support that we misused
20 the corporate form, that we did not respect STOPNC's
21 separateness.

22 The things that they said in that regard are things
23 like, Well, you provided some financial services and
24 management services. That's not enough to pierce the veil.
25 If that's not done on an arm's-length basis, which it was

1 here, that's not enough. We didn't share employees. They
2 said, Well, you have the right to appoint two directors to the
3 board of directors. As we cited the Supreme Court of the
4 United States, that's not enough to shift liability. They
5 mention that --

6 THE COURT: Well, I don't look at these things
7 individually, do I? As I understand it, the plaintiffs are
8 supposing a collection of facts.

9 MS. GREER: Absolutely, that's correct.

10 THE COURT: Name, plus other things.

11 MS. GREER: The totality of the circumstances.

12 THE COURT: Right.

13 MS. GREER: Exactly, but what I'm suggesting to you
14 -- and I'm looking at each one and then I want to explain to
15 you that collectively, for example, in the *Edmonds* case, they
16 found that the principal was so completely dominating the
17 subsidiary, had complete control and dominion or domination --
18 they use different words -- that it would otherwise support
19 piercing the veil, and the court said, no, we're not going to
20 pierce the veil because there's been no misuse of the
21 corporate form here, and that's what's lacking here.

22 I mean, the Court, no doubt, has seen alter ego
23 allegations over the years, and the three features that are
24 kind of -- what I call the real indicia that kind of cross all
25 lines are things like commingling of property and assets

1 and/or capitalization and diversion of corporate assets, and
2 none of that is present in this case. All they've got is a 50
3 percent ownership, which, again, is not control. The fact
4 that they provided a board room for STOPNC to have its board
5 meetings -- you know, my church provides a place for our
6 neighborhood association to have meetings as an accommodation
7 because they're in the same community. That's not the kind of
8 thing that warrants piercing the veil. What warrants piercing
9 the veil is when you're really misusing the separate forms and
10 those allegations are lacking here.

11 As to the Ascension parties, it's even more remote.
12 They say absolutely nothing about Ascension. The only
13 specific thing that they have said about either Ascension
14 parties that would warrant piercing the veil even between
15 these entities (indicating), not even getting all the way to
16 STOPNC, is that we listed in our Form 990, which is a form we
17 file with the IRS, that some of these entities were direct-
18 controlled entities.

19 Well, there's a definition for that under the tax
20 code, and that means if you own 50 percent or more, and
21 because these are wholly-owned subsidiaries, of course, we had
22 to list them. So, the allegations based on that have never
23 been used. I've never found a case that a Form 990
24 representation was used to pierce the veil. So, at a minimum,
25 those entities should be dismissed.

1 And then another issue that we raise as a matter of
2 law is the prohibition against the practice -- corporate
3 practice of medicine in Tennessee. Tennessee, like many
4 states, has a law that says we do not want corporations
5 directing and controlling the professional judgment of
6 physicians.

7 Here, most of the allegations, agency and otherwise,
8 are based on the actions of John Culclasure, who is a
9 physician, who, again, was an employee of Howell Allen, a
10 medical director of the clinic STOPNC, and to the extent that
11 the veil could be pierced or even agency allegations could be
12 made based on his actions, that is barred as a matter of law
13 under Tennessee law. We made that argument in our motion. It
14 was not responded to.

15 And I know I'm running low on time, so let me make a
16 brief statement on the agency issues because those are
17 different.

18 As to the agencies, again, the focus is on the
19 actions of two individuals who there's been no showing that
20 they had actual authority of any kind to act on behalf of my
21 clients. They did not have apparent authority. There's not
22 been an allegation that someone was dealing with Nurse
23 Schamberg and thought they were dealing with any of my
24 clients, and there's been no ostensible agency.

25 The only cases that they've cited have been cases

1 that involved emergency-room practitioners and that is a very
2 different model. If you walk into an emergency room, most
3 people who are not familiar with healthcare will assume that
4 the people that work there are employees of the hospital. So,
5 that's why Tennessee and other states have laws that require
6 you to have some sort of disclaimer if you don't want to incur
7 the liability.

8 This is very different. The STOPNC clinic is a
9 different building. It has a different entrance, different
10 signage. It's completely separate from our facility, the
11 Saint Thomas facilities. And so, to suggest that we would
12 have to disclaim another building and say that's not ours
13 makes no sense, and they don't cite any law for that
14 proposition. So, we would ask that the Court dismiss the
15 Ascension parties and the Saint Thomas entities on the
16 pleadings.

17 THE COURT: The Saint Thomas entities are on the left
18 side of your paper?

19 MS. GREER: Yes, your Honor.

20 THE COURT: You don't speak for the STOPNC?

21 MS. GREER: No, your Honor.

22 THE COURT: Okay. Thank you.

23 Who else wants to speak for Tennessee?

24 MR. GIDEON: C.J. Gideon and Chris Tardio wish to
25 divide the remaining time.

1 MR. TARDIO: Good afternoon, your Honor. Chris
2 Tardio.

3 As your Honor picked up on, we represent the entities
4 on the right-hand side of this chart, and I want to take a few
5 minutes to talk about the Healthcare Liability Act, which your
6 Honor mentioned a moment ago at the beginning of Ms. Greer's
7 presentation, and then I'll turn the presentation over to Mr.
8 Gideon to deal with the bulk of the global issues.

9 We have two motions pending, one deals with pre-suit
10 notice and certificate requirements, another deals with the
11 global motions -- or the global issues of law. I'll address
12 briefly the Healthcare Liability Act and then the statutory
13 requirements.

14 In Tennessee in 2008, the legislature passed the
15 first round of tort reform and the first round of pre-suit
16 requirements in at that time medical malpractice actions.
17 That's what they were called. And the statute was amended
18 over the years and what we have now is two separate statutes,
19 121, which requires pre-suit notice of a healthcare liability
20 action at least 60 days before suit is filed.

21 THE COURT: How does the statute define a healthcare
22 liability action?

23 MR. TARDIO: That's the heart of the issue here. A
24 healthcare liability action in Tennessee is defined as any
25 claim for injury -- any claim against a healthcare provider

1 for injury related to the provision of healthcare services.

2 If you look at the legislative history behind that
3 statute -- that's 29-26-101, the definition. If you look at
4 the legislative history -- I mean, obviously, it's very, very
5 broad to some --

6 THE COURT: I assume it does not apply to
7 pharmacists.

8 MR. TARDIO: It does apply to pharmacists.

9 THE COURT: Pharmacists who sell a drug are deemed to
10 be providing healthcare services?

11 MR. TARDIO: If the claim is for injury related to
12 the provision of healthcare services, then, yes, the claim
13 falls under the Healthcare Liability Act and the -- another
14 important part of the act is that the language says
15 "regardless of any other claims or theories in the complaint."

16 So, if there is a claim in that complaint for
17 injury -- claim against healthcare provider for injury related
18 to the provision of healthcare services, the requirements of
19 the act apply, 121 the pre-suit notice requirements and 122
20 the certificate requirements.

21 And the -- if you look at the legislative history
22 behind the act -- and we've cited some of it in the
23 briefing -- the intent was to avoid exactly what happened
24 here, plaintiffs attempting to plead around the requirements
25 of the act. The sponsoring legislator said in some of the

1 legislative history that we have cited, "It is advantageous in
2 the minds of some plaintiffs to keep their lawsuit out from
3 under the healthcare provider statutes, make a cause of action
4 look like something it isn't at its core."

5 So, you spend most of your time at the outset trying
6 to define what the cause of action is. We're hopeful that
7 this statute will obviate some of that and reduce some of the
8 time spent. These claims are for injury related to the
9 provision of healthcare services.

10 THE COURT: So, if somebody sells prosthetic devices,
11 for example, that would also be a healthcare-related injury?

12 MR. TARDIO: If it's against the healthcare -- if the
13 claim is against the healthcare provider and the injury --

14 THE COURT: But that begs the question, you know,
15 whether somebody who sells a product is a healthcare provider.
16 That's a distinction that the plaintiffs certainly make.

17 MR. TARDIO: I don't know that the plaintiffs make
18 any argument that we're not healthcare providers.

19 THE COURT: Well, they make the argument that the
20 statute applies to those who provide the service, not to those
21 who sell a product, as I understand it.

22 MR. TARDIO: Well, they've chosen -- what the
23 plaintiffs have done is said, We're not suing you. We're
24 bringing a product liability claim. We're not suing you as
25 healthcare providers, but the statute -- that's not the way

1 the statute is written.

2 The statute is written broadly, such that if the
3 injury claimed is related to -- not arising from, related to
4 healthcare services, it falls within the act, regardless of
5 any other claim in the complaint, and that's -- no matter how
6 you twist --

7 THE COURT: Healthcare services? Related to
8 healthcare services?

9 MR. TARDIO: Yes, ma'am, and that's defined --
10 healthcare provider and healthcare services are both defined
11 within the act, and if you look at allegations in these
12 complaints, that's what the claims are for. They're for --
13 regardless of any other claims in the complaint, 121 and 122
14 must be followed.

15 Let me just very briefly touch on the 122, which is
16 the certificate requirement deficiency.

17 If the Healthcare Liability Act applies, and it does
18 under the broad definition, at least that's our position, you
19 have to file a certificate of good faith or certificate of
20 merit with the complaint.

21 43 cases didn't have one filed with it. About a
22 dozen are easy. They specifically alleged negligence against
23 healthcare provider and injury related to the provision of
24 healthcare services. There's no excuse for not filing one in
25 those cases. Those cases should be dismissed with prejudice

1 under the plain language of the statute.

2 THE COURT: Is it clear that the statute does not
3 permit an amendment of the complaint?

4 MR. TARDIO: The *Vaughn* case, which we've cited, and
5 our Supreme Court denied cert and it said that an amendment is
6 not sufficient under the act to cure deficiencies. You can't
7 amend later. And if you think about the policy reasons behind
8 it, the intent of the certificate requirement is that when you
9 filed the complaint, you've had somebody -- an expert look at
10 the case and certified its merits. If you filed that three or
11 four months later, it defeats the intent behind the act.

12 THE COURT: Excuse me one moment.

13 (Discussion off the record at the bench.)

14 THE COURT: Excuse me one moment.

15 Are counsel in the criminal case here?

16 COURTROOM DEPUTY CLERK URSO: John is here. Mr.
17 Butters is -- he's up in the library.

18 (Discussion off the record at the bench.)

19 THE COURT: I'm sorry. Go on.

20 MR. GIDEON: Your Honor, I'm going to finalize our
21 presentation on behalf of the Tennessee clinic defendants.

22 You need to add on the right side of the page some
23 additional names. We also represent John Culclasure, who is
24 an M.D., anesthesiologist who administered a number of
25 injections. Debra Schamberg, who is a Registered Nurse who

1 was the practice operator for STOPNC, Registered Nurse. She
2 is named as an individual defendant.

3 THE COURT: As to them, you're invoking the statute
4 that says they have to certify ahead of time?

5 MR. GIDEON: Yes, ma'am.

6 As well as Howell Allen, which is a professional
7 corporation made up of a group of neurosurgeons.

8 To track what Mr. Tardio said just a moment ago,
9 there's some additional reasons why the Products Liability Act
10 of Tennessee does not apply by definition. First, what was
11 delivered here, even as it is described in the master
12 complaint, is services. These patients predominantly had
13 lower back pain, serious lower back pain. They were referred
14 to STOPNC for the epidural steroid injections, and a physician
15 administered the injection in the epidural space. Granted,
16 the physician used methylprednisolone acetate secured from
17 NECC, but there wasn't a sale of MPA to any of the patients.

18 THE COURT: How did the physicians treat this service
19 and -- with an injection on their bills?

20 MR. GIDEON: The Howell Allen Clinic billed for the
21 physician fee by Dr. John Culclasure, and if the Court will
22 look at Exhibit 8 to the Reed complaint, there is also a
23 charge for a facility fee that is approximately \$1,042. There
24 is no bill for MPA. There is no bill of sale for MPA. There
25 is no discrete individual charge for the steroid. So, we

1 respectfully submit to the Court there was no sale.

2 And one of the reasons why the Tennessee Products
3 Liability Act does not apply, your Honor, is because (A) there
4 was no sale, but for the act to apply, there has to be a sale
5 by a seller who is engaged in the sale of those products. So,
6 it eliminates this by definition.

7 Secondly, there is no tangible product or good here.
8 There is a service, the delivery of a healthcare service,
9 which I know this Court is familiar with. The vast majority
10 of the jurisdictions that have looked at this issue, even when
11 there is a defective product involved like the defective
12 devices in the mouth and the back that we cited in our case
13 submissions, always treated predominantly as a service and
14 that has been the rule in Tennessee as well.

15 Tennessee is one of those states that does not
16 distinguish between a sale versus a service in the same
17 transaction. The Court looks to see what is the predominant
18 aspect of the relationship, which in this case is a service,
19 and if it is, the products act does not apply.

20 Finally, Mr. Tardio didn't touch on this fact, but
21 there is a definition of healthcare providers that fall within
22 the act. It extends to hospitals, ambulatory service centers,
23 physicians, even certified nursing assistants in nursing
24 homes, to give you some idea of the intended breadth of the act.

25 So, one of the principal points for the Court to

1 address is, the plaintiffs wish to impose liability without
2 fault on these healthcare providers. The Healthcare Liability
3 Act of Tennessee says there cannot be liability without fault.
4 If we are responsible, we are responsible only if they prove
5 there was a departure from accepted standards of professional
6 practice that caused an injury which would not have otherwise
7 occurred.

8 THE COURT: But we can't deal with that at the moment
9 because we do not have evidence yet and there's been no
10 discovery on this issue at this point, right?

11 MR. GIDEON: I'm not asking for summary judgment on
12 the merits.

13 THE COURT: I understand.

14 MR. GIDEON: I'm saying that the substantive law that
15 should apply is the Healthcare Liability Act, not the Products
16 Liability Act.

17 Two additional points that I think the Court should
18 focus on. We filed our motion to dismiss on January 10th,
19 2014. We raised nine grounds, eight of them are due to be
20 granted and should be allowed based on the plaintiffs' March
21 28th, 2014 response.

22 The product liability claims against Drs. Culclasure,
23 Lister, and Schamberg should be granted. They aren't sellers
24 under any scenario, any argument at all. The product
25 liability claim against Howell Allen should be granted. They

1 didn't sell anything and they admit that in their response.
2 The claims of ordinary negligence should be dismissed. The
3 Tennessee Consumer Protection Act claim should be dismissed.
4 It's clear that that does not apply here. The medical battery
5 claims were not contested, and the failure to warn or lack of
6 informed consent claims should be dismissed as well.

7 The only thing that should remain as to our
8 healthcare provider clients is a claim under the Healthcare
9 Liability Act, nothing more.

10 We also respectfully submit that civil conspiracy and
11 agency should be dismissed. Why should the civil conspiracy
12 claim be dismissed? When your Honor looks at the materials,
13 you will see, taken in the light most favorable to the PSC --
14 they say that Debbie Schamberg was told by a representative of
15 NECC that she had to provide a patient list to get a further
16 supply of MPA. She said I can't predict who will be here next
17 week. And they said any list will be fine. So, she gave them
18 the list, and even their allegations establish she was doing
19 so with the intent to comply with what she was told was
20 Massachusetts law.

21 That's not a civil conspiracy. There is no intent to
22 violate the law by Debbie Schamberg and, in addition, in
23 Tennessee a compounder can provide product in anticipation of
24 a prescription. An individual prescription is not required as
25 a matter of law.

1 Vicarious liability and agency. There is absolutely
2 nothing in these papers that would establish that my clients
3 should be held responsible for NECC. There's not even a
4 showing that we controlled their methods, means or manner,
5 which in Tennessee is required in order to establish agency.

6 And, last, as to this claim of special relationship,
7 the *Limbough* case and *Turner vs. Jordon* case, in both of those
8 cases the plaintiff was able to show that the defendant had
9 actual knowledge, actual knowledge of the threat of harm
10 created by a third party. In this case there is no such proof
11 at all.

12 Any additional questions, your Honor?

13 THE COURT: Thank you very much.

14 MR. GIDEON: Thank you.

15 THE COURT: Let me interrupt again for a moment.

16 May I see Mr. Wortmann and Mr. Butters, please?

17 (Discussion off the record at the bench.)

18 THE COURT: I'm sorry. This jury is giving me
19 trouble. We'll have to interrupt once more in order to deal
20 with the jury, but, in the meantime, we will continue with
21 this case.

22 MR. STRANCH: Your Honor, we have a notebook that we
23 put together as part of the plaintiffs' responses. It has
24 some documents, statutory sections and other things that we're
25 going to be referring to. We've provided copies for the

1 defendants, and we'll hand this up to you if that's okay.

2 THE COURT: Do you have two copies, by any chance?

3 MR. NOLAN: Yes, we do.

4 THE COURT: So, maybe we can give one to the law
5 clerks, if you would, please.

6 MR. STRANCH: Sure.

7 (Attorney Stranch hands binders to the Court and law clerks.)

8 MR. NOLAN: Your Honor, does the Court wish to
9 address the argument regarding STOPNC and their application to
10 the Products Liability Act first or the --

11 THE COURT: Whatever you wish to do.

12 MR. NOLAN: Sure.

13 THE COURT: But within the time limits, please. So,
14 how long are you going to be?

15 MR. NOLAN: Your Honor, I will be no more than 30
16 minutes.

17 I'm George Nolan from Nashville and I will be
18 discussing the application of the Tennessee Products Liability
19 Act to these sellers, and I think it's important for the Court
20 to understand how the Tennessee Products Liability Act of 1978
21 works.

22 That statute provides, your Honor, that all
23 businesses that sell or distribute products in Tennessee are
24 required to stand behind those products and cover any harm
25 caused by those products under certain limited circumstances.

1 THE COURT: This is not limited to medical products?

2 MR. NOLAN: No. The act, your Honor, defines the
3 term "seller" very broadly. It makes no effort to exclude
4 healthcare providers from the definition and, in fact, if you
5 turn in your notebook, your Honor, to the first tab, you will
6 see how the statute defines the term "seller" and it's very
7 broad and it includes some words that the defendants don't
8 focus on in their arguments. It, "includes a retailer,
9 wholesaler or distributor, and means any individual or entity
10 engaged in the business of selling a product, whether such
11 sale is for resale, or for use or consumption."

12 It's a very broad definition, no effort to exclude
13 healthcare providers. Your Honor, we know from the
14 defendants' deeds and words that they fit that definition. If
15 you turn in your booklet to Tab No. 20. --

16 THE COURT: Well, booklet this is not. It's a major
17 book.

18 MR. NOLAN: The exhibit notebook might be a more apt
19 way of putting it.

20 Tab No. 20, your Honor, is a letter sent by the
21 defendants Saint Thomas Outpatient Neurosurgical Center less
22 than two weeks after this outbreak became public knowledge
23 and, as you can see here, the clinic writes to NECC and, first
24 of all, accuses that company of breaching the warranty of
25 merchantability, and then says: "Specifically, the below

1 listed goods have been recalled and/or no longer fit for
2 use/sale due to contamination or suspected contamination."

3 So, less than two weeks after this happened, this
4 clinic is writing to NECC and threatening to sue NECC because
5 the products are not good for use or resale.

6 So, clearly, your Honor, they fit within the broad
7 definition of "seller" that we find under the products
8 liability statute. And in Tennessee, your Honor, anyone who
9 is a seller is required to stand behind that product under
10 certain limited circumstances, and the circumstance implicated
11 in this case is when the manufacturer is determined to be
12 insolvent. That's the baseline rule.

13 That is the public policy decision that our
14 legislature made, and it's a very important public policy
15 because our legislature decided that when something like this
16 happens and these terrible losses occur, the loss doesn't rest
17 within the innocent victims. It rests with the businesses who
18 make the business decision to import products into Tennessee
19 made by a manufacturer that doesn't have the wherewithal to
20 stand behind those products, and they're asking this Court to
21 make a huge and very detrimental change to Tennessee products
22 liability law that's been the law of Tennessee for the last 36
23 years, your Honor.

24 And I think it's important for the Court to also
25 focus on the definition of the term "seller" in the Healthcare

1 Liability Act, and if you look at Tab 3 of our notebook, your
2 Honor, you find how that particular term is defined in the
3 healthcare liability statute and, as you can see, your Honor,
4 the scope of that statute is key to healthcare services. It
5 doesn't say anything about products. "Healthcare services" is
6 a defined term, and our legislature wrote a very thorough
7 definition that includes any manner of services, but it never
8 anywhere says that services means products. In fact, the
9 words good, goods, service -- product or products, never
10 appear anywhere in the statute.

11 So, the defendants are asking this Court to
12 judicially insert words into the Healthcare Liability Act
13 which are not present in that statute.

14 It would have been so easy for the legislature to say
15 healthcare services includes all care, products, goods and
16 services provided to the patient, but that's not what our
17 legislature did, your Honor.

18 So, the defendants are asking this Court really to go
19 out on a limb. They're asking this Court to reverse 36 years
20 of products liability law and they're asking this Court to
21 rule that our legislature decided to completely change
22 Tennessee's scheme for allocating loss caused by harmful
23 products without ever expressly saying so.

24 And, your Honor, a ruling like that, not only would
25 it be unjust, your Honor, it would be -- it can cause this

1 litigation to boggle on for years, and here's why:

2 If the Court finds that the plaintiffs are allowed to
3 prosecute product liabilities claims against these defendants
4 as sellers, then these defendants are required to stand behind
5 the product and they are jointly or severally liable for the
6 harm caused by the product. Suddenly the case becomes simple
7 and it will move to resolution under very just circumstances
8 and in accordance with public policy adopted by the Tennessee
9 legislature, but if the Court adopts the defendants' position,
10 then we'll be here a decade from now arguing over the
11 defendants' compared default defenses, and the fact that they
12 want to try these cases to the jury verdict form that has a
13 long list of parties, including the FDA and the CDC and the
14 Massachusetts Board of Pharmacy and the Tennessee Board of
15 Pharmacy, and they want to attribute fault to all of those
16 particular players and that, your Honor, that would be
17 completely contrary to how our products liability system is
18 set up.

19 Your Honor, in our statute we have a provision that's
20 not present in any other state and that's a provision that
21 says that there is one circumstance and only one circumstance
22 in which healthcare providers are not considered sellers and
23 that's when the product is a silicone gel breast implant and
24 that statute was passed in '93, your Honor, at the request of
25 a very highly-regarded woman senator in Tennessee who was a

1 breast cancer survivor and it was in the midst of the Dow
2 Corning litigation in which -- at a time when thousands and
3 thousands of cases across the country were pending against Dow
4 Corning and this particular senator thought that it was unfair
5 that some of the women in Tennessee were having their claims
6 time barred by Tennessee's ten-year statute of repose in
7 products cases. So, she proposed a bill to extend the statute
8 of repose from ten years to 25 years for that particular
9 product, and when she proposed that bill, the medical
10 community pushed back and they lobbied into the bill, your
11 Honor, a statutory carve-out indicating that for purposes of
12 that product only, that product only, that healthcare
13 providers are not considered sellers and that carve-out, your
14 Honor, is found in your booklet under Tab 2A.

15 So, the statute is very clear. There's only one
16 circumstance in which healthcare providers are not considered
17 sellers and that's when we're discussing a silicone gel breast
18 implant, and in all other circumstances, in all other
19 circumstances, your Honor, the healthcare providers have the
20 same obligations as any other business that sells a product.

21 And, your Honor, as the Court observed, we do
22 specifically allege in our complaint that these clinics sold
23 this stuff. They broke out the charges separately. They
24 charged separately for the doctor's service and they sent a
25 bill to Medicare and the other insurers for the injection

1 itself and the injection is the steroid. That's the only
2 reason for that transaction.

3 That concludes my portion of the --

4 THE COURT: Thank you.

5 MR. NOLAN: Unless the Court has a question.

6 THE COURT: No, I do not.

7 MR. NOLAN: Thank you.

8 THE COURT: I'm not exactly sure how to do this. Who
9 is arguing next?

10 MR. CHALOS: I am, your Honor.

11 THE COURT: How long will you be?

12 MR. CHALOS: About ten minutes probably.

13 THE COURT: I think Ms. Urso has gone to get the
14 jury. If you could just --

15 COURTROOM DEPUTY CLERK URSO: I'm sorry.

16 THE COURT: Don't all leave. If I could have one
17 chair in each of the front tables, that's all I need, just one
18 chair. Oh, yeah, we need two.

19 COURTROOM DEPUTY CLERK URSO: You can leave your
20 stuff. This will not take very long.

21 THE COURT: Okay. Bring the jury down.

22 (Pause.)

23 THE COURT: Sorry about this. And we will continue
24 with New England Compounding. I thank you for your
25 indulgence, but I've managed to take care of two cases in the

1 interim. Mr. Stranch, you were next.

2 MR. STRANCH: Mr. Chalos will be next.

3 THE COURT: Okay. Mr. Chalos.

4 MR. CHALOS: Yes, your Honor. Mark Chalos on behalf
5 of the plaintiffs' steering committee.

6 I'm going to address the Saint Thomas entities'
7 arguments that they should be dismissed at the threshold based
8 on the allegations in our complaint. I'm going to leave aside
9 for now the Ascension entities. Those are the ultimate
10 corporate parent companies.

11 THE COURT: So, you're addressing the vicarious
12 liability products?

13 MR. CHALOS: Your Honor, yes, as well as some direct
14 liability that brings me to my first point.

15 Counsel for the Saint Thomas entities represent to
16 the Court that all of the allegations against her clients are
17 vicarious, and that's not entirely the case.

18 If your Honor -- again, in the notebook that Mr.
19 Nolan handed up to you, Tab 36 is Wayne Reed on behalf of his
20 deceased wife, Diana Reed, their lawsuit against these
21 entities, and this is a complaint that I'm going to refer to
22 from time to time during my argument as setting forth the
23 allegations that are operative for purposes of our discussion
24 today, and if your Honor will turn to Page 51 in Tab 36 of our
25 notebook.

1 THE COURT: Okay.

2 MR. CHALOS: Count XII claims against Saint Thomas,
3 and Saint Thomas is defined for purposes of this complaint and
4 this section to include Saint Thomas Network and Saint Thomas
5 Health. I want to pause here for one second.

6 Saint Thomas Network is a company that essentially is
7 a holding company. It has no employees and we don't know its
8 asset situation, but it's our understanding it has no assets.
9 Your Honor correctly identified these companies as not
10 essentially operating companies. These are shells and there
11 are various movements around. At one point the corporate
12 owner of Saint Thomas Outpatient Clinic was a company called
13 Saint Thomas Health Services.

14 THE COURT: Saint Thomas?

15 MR. CHALOS: Health Services.

16 Apparently, Saint Thomas Network was at one time
17 known as Saint Thomas Health Services, that now refer to Saint
18 Thomas Health -- I'm sorry. The entity they now refer to as
19 Saint Thomas Health at one time was Saint Thomas Health
20 Services as well. At some point somehow ownership
21 transferred. It's unclear to us at this point. We have not
22 yet gotten any discovery that's meaningful from these
23 entities. They've produced I think some total of 51 pages of
24 documents, two documents totaling 51 pages. So, to some
25 extent we're limited in the information we have. Appears to

1 be some shells moving around and some flimflam going on at a
2 billion-dollar hospital, but we don't yet have the information
3 to really nail it down.

4 But that said, we're at the pleading stage and our
5 obligation at the pleading stage is to plead enough facts to
6 state a claim for relief that's plausible on its face.
7 "Plausible" means it will raise a reasonable expectation that
8 this discovery will reveal evidence of the necessary elements.
9 That comes from the *Twombly* case.

10 So, looking at Count X, these are direct negligent
11 claims, direct --

12 THE COURT: X or XII?

13 MR. CHALOS: I'm sorry. XII, you're right, your
14 Honor.

15 The allegations here are that Saint Thomas, which,
16 again, includes Saint Thomas Network and Saint Thomas Health
17 and Howell Allen Clinic, were negligent in the manner in which
18 they operated Saint Thomas Neurosurgical, the clinic.

19 THE COURT: But if, as you say, they were shell
20 corporations, what obligation would they have had over the way
21 the surgical clinic operated?

22 MR. CHALOS: Well, they have an operating agreement
23 that is also in this notebook at Tab 39, which outlined, among
24 other things, the powers of the various entities and the flow
25 of the money and, as your Honor will see, it's a fairly dense

1 document. The money moved around, and what our allegations
2 are -- when I say "moved around," moved from the clinic up
3 through the Saint Thomas chain. They may call themselves
4 nonprofit entities, but there's a lot of money, hundreds of
5 millions of dollars moving around over there.

6 Ascension is a \$15-billion-a-year company. So,
7 whether they call it profits, meaning they pay federal income
8 tax on it, or they call it something else is immaterial for
9 purposes of our discussion. But, in any event, these are
10 allegations that they directly committed their own negligence.
11 At least those entities did.

12 We also have claims that the Saint Thomas entities --
13 that the clinic operated as an agent of those entities, both
14 an actual agent and an apparent agent. Those do not require,
15 nor does the direct negligence claim require any piercing of
16 any veil. Those are independent claims for the bad conduct of
17 these entities. And, again, we're at the pleading stage at
18 this point. We still need to prove our case. We need to
19 properly surmount a summary judgment motion at some point and
20 we'll need to prove it to the jury at trial, but for now we're
21 focused solely on the obligations of the complaint.

22 The allegations of apparent agency and actual agency--

23 THE COURT: Excuse me.

24 You make allegations about their obligation to --
25 with respect to the supplies from NECC.

1 MR. CHALOS: Yes.

2 THE COURT: Is that something that they would have
3 been obligated to do under this operating agreement?

4 MR. CHALOS: Well, your Honor, again, at this point
5 we have no real discovery from these entities. We have made
6 allegations based on the information available to us and it's
7 our understanding based on the information that we have at
8 this point that they had a role in that.

9 The apparent agency claim arises from a number of
10 facts. Correctly identified, it's a constellation of facts
11 and they are set forth in the complaint as well. And, again,
12 using the Reed complaint as an exemplar, starting on Page 50,
13 Count XI, that sets forth the apparent agency and actual
14 agency claims against Saint Thomas Hospital, and on Page 53
15 there are a number of allegations that set forth the claims of
16 apparent agency against Saint Thomas Health and Saint Thomas
17 Network. And, again, we're focused on the complaint, but I'd
18 like to point your Honor to a few things.

19 These are facts that I think put context around the
20 allegations and I think they also directly refute some of the
21 points that counsel for Saint Thomas made. If your Honor will
22 turn to Page 20 -- Tab 22 of the binder.

23 THE COURT: Tab 22?

24 MR. CHALOS: Tab 22. This is a photograph of how
25 Saint Thomas represents itself in the national community.

1 This is a photograph taken on a main street downtown Nashville
2 and it represents itself as, "One name, one healing community,
3 Saint Thomas."

4 If your Honor would turn to Tab 23 of the notebook,
5 it's another photograph. This is taken at the national
6 airport. Again, Saint Thomas representing themselves to the
7 national community and to the world, "One name, one healing
8 community."

9 If your Honor would turn to Tab 24, this is the sign
10 that patients see as they approach from a main street the
11 Saint Thomas Hospital campus, and it says right on top, "Saint
12 Thomas," and then on the bottom of the sign, "Outpatient
13 services." It directs you to the main building.

14 If your Honor would turn to Tab 25, you'll see a map.
15 This is the Saint Thomas facility. The clinic was located on
16 the ninth floor right where it says, "Medical Plaza East."

17 If your Honor would turn to Tab 26, this is what the
18 patients saw when they walked in the ninth floor of Saint
19 Thomas Hospital. They saw a sign that says, "Saint Thomas
20 Outpatient Neurosurgical Center."

21 Counsel for Saint Thomas entities suggested they had
22 no obligation to clear up any notion that people going to
23 Saint Thomas Hospital, when they walk into Saint Thomas
24 Hospital and go to the ninth floor of Saint Thomas Hospital
25 and go to the clinic called Saint Thomas, that they have no

1 obligation somehow to clear up the notion that this is somehow
2 not affiliated with Saint Thomas in any way.

3 I want to point out a couple of other -- if your
4 Honor would turn to Tab 28. This is Dr. Culclasure's hospital
5 I.D. This is the I.D. that he would have on the outside of
6 his clothes when he saw patients and injected them, and if you
7 look on the back of it, it says, "This card is official
8 property of Saint Thomas Health Services and must be
9 surrendered when requested by hospital authorities," further
10 supporting the notion that this clinic is in the hospital if
11 they're controlling access to the facility.

12 I want to point out just a couple of other points of
13 what Saint Thomas said to the community. Tab 29 is the letter
14 that the clinic, Saint Thomas Clinic, sent to patients to
15 inform them that they may be in grave danger because of a
16 product that was injected into them at the Saint Thomas
17 Clinic. What it highlights, it says either call us or visit
18 the Saint Thomas Hospital emergency room. Why they would be
19 directing the patients to a stranger entity is puzzling. It's
20 them.

21 Tab 30 is a medical record from Diane Reed, deceased,
22 patient at Saint Thomas. This is the record from when she was
23 admitted into the Saint Thomas Hospital. If you look at the
24 top, it says, "Saint Thomas Hospital" next to "Saint Thomas
25 Health Services." This is the physician on duty, Dr. Motyka,

1 and Dr. Motyka writes, "The patient recently underwent a
2 steroid epidural injection here five days ago." "Here,"
3 meaning the clinic in their building.

4 So, your Honor, I point those out. Those are
5 documents that we've been able to pull together over the last
6 period of time, some well after the complaints were filed.
7 These complaints were filed some time ago. These put a
8 context around the notion that these are -- it is, "one name,
9 one healing community." It's a group of entities that are
10 interrelated. They're interconnected. They call themselves
11 here...

12 And I want to point out just one more, Tab 38 of the
13 binder. This is Scott Butler, who was the CFO of the clinic,
14 and he said -- this is a quote in the newspaper. He said,
15 "This is a bad event for us, and obviously it puts a scar on
16 our doctors, our patients and our hospital." This is the CFO
17 of Saint Thomas Clinic. "Our hospital."

18 So, your Honor, at this point what we've alleged is
19 more than sufficient to withstand a 12(b)(6) challenge.

20 THE COURT: If you are -- I mean, assume that these
21 allegations -- I mean, these allegations are here. How far up
22 the chain would they go for liability purposes? I mean, would
23 you be able to catch, based on these allegations, Ascension
24 Health Reliance?

25 MR. CHALOS: Well, Mr. Stranch will address that

1 issue. The answer is yes.

2 I want to point out one more thing to your Honor and
3 then I'll stop and Mr. Stranch can take over on the Ascension
4 question.

5 Tab 33 of the book, this is a chart that we created
6 and it is a representation of the interrelationships among the
7 Saint Thomas entities, Health, the hospital, Saint Thomas
8 Network and Saint Thomas Clinic. It's sort of a counterweight
9 to the chart that they presented. They presented it in a way,
10 obviously, they think supports their case, and we presented it
11 in a way we believe supports our case and also more represents
12 reality, and that's Tab 33.

13 So, we think at the very least our allegations as
14 pleaded currently are sufficient for 12(b)(6) purposes to at
15 least allege a cause of action against all of the Saint Thomas
16 entities. Mr. Stranch will address the Ascension entities.

17 THE COURT: Thank you.

18 MR. STRANCH: Thank you, your Honor.

19 On the Ascension entities, basically, if you take a
20 look at our briefs, we think we've covered it well within the
21 brief, but what you see is that these are entities, starting
22 first with Saint Thomas, that are operating as if they're one
23 community, one set of hospitals, one corporation, and it
24 appears that the corporate leanings are being used either for
25 tax purposes or, you know, as a shell game maybe, you know,

1 but Ascension, when you go look at their tax forms -- and
2 we've had no discovery from Ascension. They say they're a
3 direct controlling -- they directly control the Saint Thomas
4 entities. They're under their direct control. That's what
5 they say.

6 They say also that Saint Thomas Outpatient
7 Neurosurgical Center is a related organization that is taxable
8 as a partnership. In other words, Ascension derives revenue
9 from Saint Thomas Outpatient Neurosurgical because it is a
10 related entity that is taxable as a partnership because it's
11 an LLC that's chosen to be treated as a partnership as opposed
12 to an S Corp or C Corp.

13 And, frankly, your Honor, these sorts of allegations
14 of agency, of corporate veil piercing, of vicarious liability,
15 these are generally dealt with after full discovery has been
16 done. And so -- you know, because they're highly factual
17 intensive. These are not the sorts of allegations where, you
18 know, you don't have to delve into, as you put it earlier, all
19 of the facts as they come together, but here you do.

20 And so, we think that the 12(b)(6), at least as it
21 relates to all of the agency, vicarious liability and other
22 claims, should be denied. We should be allowed to do the
23 discovery that we've already -- some we've already found,
24 flush those things out.

25 THE COURT: You speak on behalf of the two Ascension

1 defendants?

2 MR. STRANCH: Yes.

3 THE COURT: Not the Saint Thomas Health and Saint
4 Thomas Network?

5 MR. STRANCH: Well, I think that motion should be
6 denied as well, your Honor, but I'm speaking --

7 THE COURT: You're now not addressing the
8 relationship they have may.

9 MR. STRANCH: I'm not. I'm just discussing
10 Ascension.

11 Ascension says we directly control the Saint Thomas
12 entities. You know, we think that is by itself enough to let
13 us get some discovery. When you add in, you know, the issues
14 as it relates to STOPNC also being listed as something that's
15 a related organization for them, we think we should be
16 entitled to do that discovery and, frankly, even if it's
17 dismissed from the case, we're still going to get the
18 discovery and then maybe we'll just be amending to add it back
19 in later. So, we think it's better to move forward and
20 consider it on a summary judgment record, you know, at an
21 appropriate time. That's Ascension.

22 The other issue that I'm talking about -- and I'm
23 trying to go quickly, your Honor, to be cognizant of the time
24 and I do think this has been briefed well. So, I'm trying not
25 to cover what's already been briefed for the Court.

1 THE COURT: Yes, I appreciate all your briefs.

2 MR. STRANCH: Thank you. And I hope you've got a
3 couple of good law clerks to help you carry it.

4 THE COURT: I mean the briefs of all the people, not
5 just all of yours. All the people who are here.

6 MR. STRANCH: Well, your Honor, I'm also going to
7 talk about the product liability actions because there was a
8 group of approximately 40 cases that were filed initially only
9 as product liability actions and were not originally a product
10 liability action and a healthcare liability action, and that
11 arises because of the way that Tennessee law works.

12 We're a one-year statute state. And so, some of
13 these cases came in the door to the lawyers where they didn't
14 have 60 days to serve a notice beforehand, and it's not -- and
15 get the extra tolling of the statute that the extension of the
16 statute of limitations that you get under 121 for serving an
17 appropriate notice. And so, those lawyers are faced with the
18 decision, Do I file my products case and know I've preserved
19 that statute when I don't think it has anything to do with the
20 healthcare liability action. Go ahead and serve my notice,
21 but, alternatively, I am going to plead a Healthcare Liability
22 Act claim on down the road and let that 60 days run and then
23 amend to add those claims in.

24 You know, I can tell you, your Honor, as a
25 plaintiff's lawyer, one thing you don't do is let a statute

1 expire without a case being on file. And so, those lawyers in
2 that situation, and we should include some of my cases, they
3 file the complaint as products. We filed ours. We made it
4 clear, this is not Healthcare Liability Act. This is only for
5 the sale of the MPA, and I can tell you the insurance records
6 for some of my clients, the MPA is a specific line item that
7 they're charged for. They get one insurance record that goes
8 to the Howell Allen Clinic that's for the services provided.
9 They get a separate one that's for the facilities. It's for
10 the substance, the product itself and other materials that are
11 used during the procedure, you know. So, they get two
12 separate insurance bills.

13 And so, we break all that down and we filed that case
14 first, you know. We said in there specifically we are going
15 to assert a Healthcare Liability Act claim on down the road.
16 This is not it. We served our notices, and once the 60 days
17 runs, we're going to amend to add those claims back in.

18 And, your Honor, the purpose behind the statute, the
19 Healthcare Liability Act, is to give the 60-day almost a
20 cooling off period in which the defendants can look at what
21 they're being accused of and can decide whether they want to
22 settle the case or not, and it gives the parties an
23 opportunity to work through it.

24 Well, not a single case has been settled in this
25 litigation with any of the Tennessee entities.

1 THE COURT: *Wingate* was not Tennessee?

2 MR. STRANCH: That's not part of the Tennessee
3 entities. That's Virginia.

4 THE COURT: Oh, yes.

5 MR. STRANCH: And the defendants can't in good
6 conscience claim to the Court that they didn't know they were
7 going to have claims against them because they were calling
8 the plaintiffs, many of them, and letting them know that you
9 may have gotten this and you may be sick. They were actively
10 involved in an investigation with the Tennessee Department of
11 Health where they were looking at people who had meningitis.
12 So, any claim that they didn't know that someone was sick just
13 should fall on deaf ears, your Honor.

14 Now, if you take a look at the *Stevens* case, which is
15 from the Tennessee Supreme Court, the defendants have argued
16 that it requires strict compliance with 121 and 122 for a
17 claim to survive.

18 The *Stevens* case is different. It's from the
19 Tennessee Supreme Court. It's a very recent case and it says,
20 no, that's not correct. Substantial compliance is what is
21 required and that will meet the statute, and you have to also
22 show that there was a lack of substantial compliance and
23 prejudice to the defendants in order for a case to be
24 dismissed as a result of failing to meet the 121 and 122 pre-
25 filing requirements.

1 And I would submit to the Court, even though the
2 products liability actions are not included in there, for
3 anyone that had a Healthcare Liability Act claim, the
4 defendants can't show that there wasn't substantial compliance
5 because they all got notices. They also can't show prejudice
6 under any set of factors, your Honor.

7 In fact, if we need to brief that in individual --
8 that needs to be looked at individual cases, because we've got
9 some cases where the medical records requests were sent and
10 they never even ordered them to look at them. They made no
11 effort to determine. So, there can be no showing of
12 prejudice.

13 So, where we stand, we have the stand-alone product
14 liability actions, as we've said to the Court. Then there's
15 the healthcare liability actions that were added later. And
16 the defendants are suggesting that because of that statute of
17 limitations conundrum, all those cases, those 40-odd cases,
18 should be dismissed, with no right to recovery for the
19 plaintiffs, and we believe that is inconsistent with the
20 products liability statute, as you heard Mr. Nolan explain how
21 that statute works. We believe it's inconsistent with the
22 legislative purposes that the legislature has put forward for
23 the products liability action, and we also believe that that
24 would be inconsistent with the *Stevens* case that says to get a
25 case dismissed for problems with 121 and 122, you have to show

1 two things, actual prejudice and there was a failure of
2 substantial compliance, and those things cannot be met by the
3 defendants and, in fact, your Honor, there's no affidavit, no
4 declaration, no allegation by the defendants that they've been
5 prejudiced by this at all. And so, those -- that must be
6 denied.

7 The last aspect I want to talk about quickly again is
8 the 122 claim. That is the certificate of good faith that you
9 heard about earlier that says when you have an -- when you
10 file one of these cases, you have to certify that they've
11 conferred in good faith with an expert.

12 One of the things you need to know about that, your
13 Honor, is -- actually delve down into the statute, the
14 certificate of good faith only arises in cases in which part
15 of your proof is that there is a violation of the standard of
16 care. Products liability actions do not have a standard of
17 care. It's a strict liability standard. I don't have to put
18 someone on in a products liability case to say what the
19 standard of medical care was in a community. That's not part
20 of it. It's not something that's considered because you're
21 talking about the product, was it defective. And so, if you
22 look at it -- that's Section 29-26-115, it goes through and
23 defines exactly what you have to do.

24 So, that evidence that you would have to have to do
25 that would be the recognized standard of acceptable

1 professional practice in the profession and the specialty
2 thereof, if any, and that the defendant practices in the
3 community in which the defendant practices or in a similar
4 community at the time the alleged injury or wrongful action
5 occurred.

6 The next portion of that is that the defendant acted
7 with less than or failed to act with ordinary and reasonable
8 care in accordance with that standard in the community.

9 None of this applies to a products liability action,
10 your Honor. So, even if the Court were to say I think you may
11 need to comply with Section 121 and give pre-suit notice for a
12 products liability action --

13 THE COURT: Are you addressing those cases that you
14 say you brought explicitly as product liability cases or all
15 cases? Because there are some that are not just that, right?

16 MR. STRANCH: That's right. Well, your Honor, there
17 are --

18 THE COURT: Are you talking about only the cases that
19 were brought explicitly as product liability cases?

20 MR. STRANCH: These are the cases -- these are the
21 40-odd cases that were originally filed as only products
22 liability actions and then after the notice period ran were
23 amended to add in Healthcare Liability Act claims. They're
24 pleadings in the alternative, is what they are.

25 THE COURT: But the argument that you're making now

1 doesn't apply to any other cases that were not brought in one
2 way or another as product liability, right?

3 MR. STRANCH: Yes. So, any complaint that doesn't
4 have a product liability action, this doesn't apply to.

5 THE COURT: Okay.

6 MR. STRANCH: But I believe all the complaints do
7 have a product liability action. The question is whether they
8 were filed after the notice ran or not, and we don't think
9 that the 122 certificate of good faith applies to a product
10 liability action because there's no requirement of showing
11 what the standard of care is within a community as required
12 under 115.

13 So, we think that the 122 should be denied out of
14 hand, request on that, and as we've already explained, the
15 defendants can't meet the requirements of 121 because they
16 can't show any prejudice whatsoever, nor can they show that we
17 didn't substantially comply, because every one of those cases
18 now has notice that's been served. The notice has been filed
19 with the complaint. The medical records releases were given
20 to the defendants. They have everything now.

21 Their real argument is you filed a products liability
22 case and then 60 or 90 days later, you amended to add it and,
23 you know, you can't do that. It's a strict compliance
24 argument, which the Tennessee Supreme Court explicitly
25 rejected in the *Stevens* case. And so, we think that should be

1 denied and those cases should be allowed to go forward to
2 discovery, your Honor.

3 Do you have any additional questions for me that I
4 can address?

5 THE COURT: No.

6 MR. STRANCH: On those issues?

7 THE COURT: I do not.

8 MR. STRANCH: Okay. Thank you.

9 THE COURT: Is there anybody else on the plaintiffs'
10 behalf?

11 MR. CLAYTON: Yes, your Honor. Daniel Clayton. I
12 should be five minutes, and it's on the issue -- and this is
13 an important issue because the Saint Thomas Clinic defendants
14 represented by Mr. Gideon and Mr. Tardio have moved to dismiss
15 virtually every case, Tennessee case, for an alleged failure
16 to comply with 121.

17 And if you would, please, turn to Tab 34. And I'm
18 going to quickly address how they are glossing over this
19 statute in much the same way that they are misinterpreting the
20 product liability statute, okay?

21 When a notice letter is sent out, we have to include
22 certain things in that notice letter. The things that are
23 included in the notice letter are found under Section 2 of Tab
24 34 where it says, "The notice shall include."

25 To put this in context, the Tennessee Saint Thomas

1 Clinic defendants have said you did not include in this notice
2 letter NECC, Ameridose, Barry Cadden, et cetera, those NECC
3 related defendants. So, therefore, since you sued them, your
4 case should be dismissed, period. That's what they are
5 alleging.

6 If you look at the statute, Judge, the statute says
7 exactly what the notice shall include, and under Section D it
8 says, "A list of the name and addresses of all providers being
9 sent a notice." All providers, healthcare providers, being
10 sent a notice. Okay.

11 So, in this situation, if you have multiple
12 healthcare providers and you've given notice to one healthcare
13 provider, you have to let all the ones that you gave notice
14 to -- you have to include them on a list in here.

15 The problem with their argument is, number one, NECC,
16 Ameridose, Barry Cadden, they weren't healthcare providers.
17 They were manufacturers. Even in their brief they refer to
18 them as manufacturers, not healthcare providers.

19 Number two, NECC, Ameridose and those NECC-related
20 defendants were never sent notice because we didn't have an
21 obligation or a duty to send them notice. MDL Order No. 6
22 specifically addresses this, because under MDL Order No. 6,
23 which is found on Tab 40, it says -- on the second page of
24 that exhibit, it says there's a waiver. If there happens to
25 be any kind of pre-suit notice anywhere, any state in the

1 country as to these NECC-related defendants, it's waived. You
2 don't have to send them notice. It's waived.

3 And on top of that, underneath Paragraph E it says,
4 "Any pleading or motion asserting the applicability of any
5 state lawsuit requirements described herein, whether
6 considered procedural or jurisdictional, is deemed struck as
7 to these parties." All right.

8 So, the Tennessee Saint Thomas Clinic defendants are
9 trying to rewrite -- if you go back to Tab 34 -- the
10 healthcare liability action, because when the notice letter is
11 sent out, we only have to include the names and addresses of
12 all providers deemed sent a notice.

13 In terms of NECC, Ameridose, Barry Cadden were never
14 sent notice so, therefore, they do not have to be on this
15 list. There's no statutory requirement they be on the list,
16 period.

17 Then the Saint Thomas defendants are saying you need
18 to dismiss these cases because they didn't give us a HIPAA
19 authorization allowing them to get the records from NECC,
20 Barry Cadden and that crew, but if you look at Subsection E,
21 under what the notice shall include, that's on Tab 34, it says
22 the exact same thing here, a HIPAA-compliant medical
23 authorization permitting the provider receiving the notice to
24 obtain complete medical records from each other provider being
25 sent a notice.

1 NECC, Ameridose and those NECC defendants were never
2 sent a notice. We had no obligation to include them on some
3 list. We had no obligation to include them and no statutory
4 requirement to give them a medical authorization form to get
5 records that NECC wouldn't even have because it's -- the
6 Tennessee clinic defendants sent them a list of names and they
7 weren't patient-specific restrictions. They just sent them a
8 list of names, including Mickey Mouse. So, maybe if I
9 represent Mickey Mouse, maybe NECC would have records on that,
10 but I doubt it, but it shows the absurdity of their position,
11 Judge, and it's a good ending point because it covers so much
12 of what's going on before us today. Thank you, Judge.

13 THE COURT: Thank you.

14 Any other plaintiffs wish to be heard?

15 MR. STRANCH: Your Honor, unless you have specific
16 questions for the plaintiffs, we'll rest on our papers.

17 THE COURT: Thank you.

18 Any defendants who wish to have brief reply or --

19 MS. GREER: Yes, your Honor.

20 THE COURT: Wait a minute.

21 You have not spoken yet and -- I'm sorry. Your name.

22 MR. BLUMBERG: My name is Jay Blumberg, but I'm with
23 the Premier defendants.

24 THE COURT: Right. You have not had a chance to talk?

25 MR. BLUMBERG: Correct. Would you like the replies

1 first? How do you --

2 THE COURT: No. You go ahead.

3 MR. BLUMBERG: Okay. Your Honor, our motions to
4 dismiss are obviously fully set out in our papers, but I want
5 to just touch on a few of them.

6 The first and I think the one that may be the easiest
7 to decide by the Court is whether my defendants are subject to
8 the Product Liability Act, and I think caselaw and the
9 statute, more specifically the statute in New Jersey, is clear
10 that professionals who are engaged in the practice of medicine
11 are not subject -- are not sellers under the Product Liability
12 Act if, in fact, that product is being utilized as part of the
13 medical care that's being rendered.

14 I don't think there's any question in this case --
15 and if you look at the plaintiffs' reply brief, they basically
16 almost acknowledge that, in fact, these entities are not
17 subject to the Product Liability Act, and I would submit to
18 the Court that based upon that, all claims with respect to
19 product liability should be dismissed against all of the
20 Premier defendants.

21 In addition to the fact that they are not subject to
22 the Product Liability Act, I would also submit, your Honor,
23 that they're also not subject under the statute to the
24 Consumer Fraud Act, because the Consumer Fraud Act is also
25 very specific that when there are learned professionals

1 involved in the rendering of medical care, that, in fact, they
2 are not subject to the Consumer Fraud Act and, in fact, there
3 is at least one case, *Macedo vs. Dello Russo*, which indicates
4 that -- it continues to identify that learned professionals
5 are beyond the reach of the Consumer Fraud Act and even look
6 to the legislature to change that if the legislature wanted to
7 do so. That was back in 2004, I believe, and, in fact, no
8 action has been taken by the legislature.

9 So, it's clear that the learned professionals, which
10 would be my clients in this case, the Premier defendants, are
11 beyond the reach of the Consumer Fraud Act.

12 The third thing that I would like the Court to take
13 knowledge of is -- and I will say that some of my arguments
14 are the same as Mr. Gideon's with respect to civil conspiracy
15 and with respect to the agency claims as well, that there is
16 no -- in terms of even the pleadings, there is no allegation
17 -- or there is no credible allegation in this case that, in
18 fact, there was a civil conspiracy. There was no allegation
19 of an agreement.

20 And, in fact, in our case, as -- I don't think
21 anybody can point to a situation in the New Jersey case where
22 an individual who was identified on those order forms did not
23 get the medication, and I would submit to the Court that those
24 individuals did get that medication. So, I would submit that
25 the civil conspiracy claim should be dismissed as well.

1 And then, finally, your Honor, I will -- the agency
2 claim as it relates to the fact that my client should somehow
3 be responsible for the conduct of NECC, it's just not borne
4 out by any facts that have ever been pled. We purchased a
5 product from NECC, and there is no credible evidence --
6 there's no credible pleading that, in fact, shows that we are
7 somehow now responsible for the product that we purchased from
8 NECC.

9 And, again, I know I said "finally," but the last
10 thing is battery. The plaintiffs allege -- seriously allege
11 that we committed battery because we didn't tell patients that
12 we were going to inject a contaminated steroid into their
13 back, and there was never anything that could ever be shown --
14 and I don't even think it's pled -- that we had any knowledge
15 whatsoever that that was the case.

16 So, I would submit to the Court for those reasons, I
17 would ask the Court to dismiss those cases -- or those claims
18 at this juncture and it's appropriate to do it at this
19 juncture because of the fact that -- the way the pleadings are
20 structured.

21 THE COURT: Thank you.

22 (Discussion off the record.)

23 THE COURT: All right. Now, you want to talk to
24 Premier?

25 MR. COREN: Yes, your Honor. Michael Coren. Once

1 again, co-chair of the creditor's committee, and also I'm a
2 plaintiffs' counsel with matters that are pending -- one
3 matter that is pending against Premier and several others to
4 come.

5 I'm going to divide our argument. I just want to
6 handle factual issues, factual issues and some legal issues my
7 colleague, Mr. Thomas Martin, is going to address with you,
8 your Honor.

9 THE COURT: How much time do you --

10 MR. COREN: Me, I'm only going to need about five
11 minutes, maybe six minutes, okay, because I've got -- I just
12 have --

13 THE COURT: I have one case after I finish with you.

14 MR. COREN: I understand, your Honor. Okay.

15 Your Honor, they say that there is no conspiracy, no
16 agreement going on here, and it's mind boggling that across
17 the country, clinic after clinic is submitting bogus
18 prescription order forms in the same way as Tennessee did.
19 It's the same way that --

20 THE COURT: What do you mean?

21 MR. COREN: What I mean by that, your Honor, is
22 they're taking all old fictitious names or they're taking
23 former patients and they're putting those former patients down
24 on the prescription order form and the order form is attached
25 to my -- my declaration.

1 THE COURT: What does it have to do with this case?

2 MR. COREN: It has to do with the fact that they say
3 there's no agreement, no conspiracy going on, and the point of
4 fact of the matter is, clinic after clinic is submitting bogus
5 lists to NECC and it has to be coming from both NECC and the
6 clinic has to agree to do that. It is simply wrong to take an
7 old name, put it on a prescription and send it in to get
8 medication that's a controlled substance under Massachusetts
9 law.

10 And, your Honor, Massachusetts law, when it comes to
11 prescriptions from a compounding pharmacy, is controlling.
12 Why is that? Chapter 94 of the statutes of Massachusetts says
13 so. At Section 19 they say that -- excuse me -- 17 they say
14 out-of-state doctors' prescriptions will be honored, but they
15 have to comply with Massachusetts law. Massachusetts law at
16 19 says no office supplies. You have to write a prescription
17 for a respective plaintiff, a respective plaintiff fills it.
18 Then at 22, it says you have to have the doctor's name, the
19 patient's name, which, by the way, it's also the law of New
20 Jersey by regulation. A prescription has a patient name.

21 What were they doing? Patients would come in. They
22 would administer steroid shots either in the back or in the
23 hip or in the shoulder and then a couple of days later to
24 renew their office supply, they put the order form and, once
25 again, it's in our declaration -- my declaration that we

1 submitted to you in response.

2 And on Page 3 of my declaration, there's a chart,
3 your Honor, and if you take a look at that chart, you're going
4 to see that for patient -- because we filed under seal, I'm
5 going to refer to patient one or two. Patient one, date of
6 injection, 6/27/12. Date of purported prescription, the same
7 day, 6/27/12. The purchase order date, that date. When does
8 the drug actually get shipped? Two days later. Now, how do
9 you go back in time in this particular matter? You can't.
10 Other prescriptions are filled several days or several weeks
11 later.

12 So, what was going on here is, once again, to get
13 office supplies, in violation of Massachusetts law, which is
14 by statute governing, they were falsifying or sending in bogus
15 prescriptions. That violates Chapter 93A because they decided
16 to come here to Massachusetts. So, Massachusetts Consumer
17 Protection Law for that violation is going to be applicable.

18 Two, it actually also violates -- because now they're
19 giving somebody else's prescription to my client, his client
20 and other New Jersey clients -- patients, that violates the
21 law. And the next thing is that they're charging them for
22 Depo-Medrol, not a knock-off compound that they bought
23 cheaper, but a prescription medicine. So, what it is in New
24 Jersey -- and I know I'm going to segue for a moment into the
25 law. I apologize, Bob.

1 But in New Jersey, where you're dealing with the
2 economics, the business, the front end of -- the business end
3 of the medical practice, that's covered under the New Jersey
4 Consumer Fraud Law as well.

5 And I would propose to you, your Honor, that both
6 statutes, both apply because they're not mutually exclusive.
7 Both states have an interest in protecting it. Both can apply
8 and it's an issue of dual sovereignty, not choice of law, as
9 to that.

10 So, your Honor, I ask that you seriously do take a
11 look at my affidavit. I think you'll be able to follow it.
12 Once again, we summarized it into a chart for your
13 convenience, but I think it all bears out, you know, with the
14 documents that we've submitted. So, yes, there was an
15 agreement. Yes, the CFA can apply.

16 As to the other legal issues, I would like to yield
17 to my colleague.

18 THE COURT: Thank you. Mr. Martin.

19 MR. MARTIN: Yes, your Honor. I will be brief and
20 try not to repeat the things covered in the briefs here, but I
21 first want to clarify a point which may be a little ambiguous,
22 and that is with respect to the application of the New Jersey
23 Product Liability Act to this motion.

24 The master complaint that was filed here does not
25 have any claim under the New Jersey Product Liability Act.

1 The New Jersey committee made a conscious decision not to make
2 a claim under that act because of the specific provision that
3 it has which is different than, as I understand, the Tennessee
4 law, that delivering a product in the course of medical
5 treatment is not selling the product for the purposes of
6 product liability law. So, that act really doesn't have any
7 application to this motion.

8 What the defendants did is they made a claim that
9 negligence actions are barred because there is a product
10 involved and that's how they brought in the Product Liability
11 Act. That claim is not borne out by any of the decisions in
12 New Jersey that have looked into that issue.

13 Specifically, there's a couple of cases that we've
14 cited in the brief that involved blood supplies that were
15 tainted with HIV, and the court specifically held that for
16 policy reasons, they were not going to apply strict product
17 liability law, but that if there is a fault proved against the
18 medical provider in connection with the providing contaminated
19 blood products, that negligence claim can proceed, and that's
20 exactly what we have here.

21 There's also a decision that we cited, the *Estate of*
22 *Halbert Finich* (phonetic), which was not addressed by the
23 defendants in their reply memorandum that involved tainted
24 blood with hepatitis and, again, the court said the same
25 thing, that we're not going to apply the Product Liability Law

1 here, but we will allow for a claim of ordinary negligence,
2 and that's what we have here.

3 So, I didn't hear Mr. Blumberg even address the issue
4 of whether the negligence claims should proceed here. I think
5 it's clear that the negligence claims presented in the master
6 complaint do survive and should proceed.

7 With respect to the battery issue, again, I'll try to
8 be very brief. The defendants' motion stated that under New
9 Jersey law, there is no claim for battery in connection with
10 failure to provide sufficient information in obtaining consent
11 to a medical procedure, and that's not exactly true, because
12 what New Jersey law does provide is that a claim of informed
13 consent -- lack of informed consent does not lead to a
14 battery. However, if you obtain consent for one type of
15 procedure and perform another one, that is a battery.
16 Specifically, that the caselaw in New Jersey addressed the
17 issue of a patient who said they objected to the use of a
18 cadaver bone in a bone-grafting procedure --

19 THE COURT: How does that apply in this case? I
20 mean, are you suggesting that they only gave consent to
21 good --

22 MR. MARTIN: No, your Honor, that's not it. It's not
23 only they gave consent to non-contaminated products. They
24 gave consent to the Depo-Medrol product, which is an FDA-
25 approved product manufactured under FDA guidelines. They did

1 not give consent to the compounding situation which we have
2 here and which as a result of the compounding errors, led to
3 the harm.

4 So, it's similar to the case that we cited and it's
5 also cited by the New Jersey Supreme Court, *Ashcroft*, where
6 there was a transfusion and the patient said that, My family
7 members gave blood and I was -- gave consent to be transfused
8 with their blood and, yet, what the hospital did was give them
9 a transfusion from general supplies of blood, and the
10 California court found that that stated a cause of action for
11 battery and, similarly, the Arizona court that we cite found
12 that if you give consent for one type of anesthetic, that does
13 not give the physician the right to administer a different
14 type of anesthetic.

15 That's almost exactly on point with what we have
16 here. Giving consent to one type of injection does not shield
17 the medical professional from a claim of battery for
18 administering a different product entirely.

19 Just very briefly with respect to the agency claims
20 here, the master complaint alleged that the NECC entities were
21 acting on behalf of the New Jersey medical providers when they
22 compounded the materials and delivered to New Jersey. As
23 they're an agent in doing that, the Premier defendants are
24 responsible.

25 In response, the defendants in their motion state

1 that under New Jersey law, an agent, if it's an independent
2 contractor, does not provide liability to the principal, but
3 what we pointed out is that if the principal hires an
4 incompetent agent, then that agent's actions do give liability
5 to the principal.

6 The defendants don't contest that in their reply
7 memorandum. What they said is that the master complaint does
8 not allege sufficiently that the NECC entities were
9 incompetent.

10 I think, frankly, your Honor, that's just silly.
11 There's hundreds of paragraphs of allegations detailing the
12 incompetence of the NECC defendants. So, I think that, again,
13 the agency principle should apply.

14 I think Mr. Coren adequately explained the factual
15 nature behind our conspiracy claim and I won't prolong that.

16 With respect to the Consumer Fraud Act, New Jersey
17 decisions are quite consistent and proudly assert that the New
18 Jersey Consumer Fraud Act is perhaps the broadest and most
19 consumer friendly Consumer Fraud Act in the country. The
20 claim that a medical professional cannot be sued under
21 Consumer Fraud Act because they are learned professionals is
22 just wrong. You can't sue them under the fraud act for
23 actions taken as part of their profession.

24 However, here what we've alleged is that these
25 medical professionals acted as merchants and with a common

1 plan, which the NECC defendants figured out a way to get a
2 product outside of the FDA scope of scrutiny and have it
3 cheaper and increase everybody's profits. They were acting as
4 a merchant when they did it, and we should be allowed to
5 pursue the discovery on that claim as well, your Honor.

6 THE COURT: Thank you. If I absolutely must hear any
7 replies, you got three minutes total.

8 MS. GREER: Your Honor, I'll make it very brief, but
9 I do think it's a little unfair that we were given five pages
10 to do a reply and had to get everything in and now they come
11 forward with a book of evidence that they haven't cited in
12 pleadings and we haven't had a chance to respond to. If the
13 Court would prefer to do supplemental brief, we could come
14 back and explain these things.

15 The evidence does not add up any more than the bus
16 allegation. We explained in our reply that the bus and the
17 "one healing community, the one name," doesn't even include
18 STOPNC. So, how that could be evidence of alter ego is beyond
19 me. It's clear from the Website that that's not even part of
20 it.

21 I'll leave it to you as to how you would like me to
22 go through each of these pieces, but they do not support the
23 allegations that they are making now and they don't overcome
24 the strong presumption.

25 THE COURT: Mr. Gideon.

1 MR. GIDEON: Yes, your Honor.

2 I'm not going to characterize the arguments you heard
3 as absurd, but I do want to respond to a little bit of the
4 hyperbole.

5 Mr. Nolan told you that if you decided in our favor,
6 you would be changing law of Tennessee, and that's absolutely
7 inaccurate. Our position is supported by the published case
8 of *Burris vs. Hospital Corporation of America*, decided in
9 1999, that dealt with a case much like this where there was
10 care provided and allegedly a defective product, and the
11 holding was the Malpractice Claims Act provided the sole
12 substantive basis for evaluating the defendant's liability.

13 The carve-out that they referred to, 29-28-103. The
14 one point we agree on is Senator Thelma Harper sponsored the
15 25-year statute of repose, but we cited the legislative
16 history in which she was asked, What's this deal with? And
17 she said, This does not deal with malpractice. This deals
18 only with a product.

19 Article II, Section 17 of the Tennessee Constitution,
20 if it applied in Washington, we wouldn't have the problems we
21 have with legislation because it says any bill can only
22 address one subject and that subject has to be in the caption.
23 And you know what the caption of that act was that Mr. Nolan
24 relied on to completely changed the law? The caption was, "An
25 act relative to statute of limitations." It clearly was not

1 intended to carry out the result he intends to get you to accept.

2 The Healthcare Liability Act clearly applies.

3 Paragraph 17 of the master complaint makes it clear they're
4 suing us for providing services.

5 Two additional points. The binder that Ms. Greer
6 referred to a moment ago, don't you think if there was a
7 single document that supported the argument that there was a
8 sale of MPA, it would be somewhere in that binder that was
9 just given to us right before the argument? And it's not
10 there, not at all.

11 Finally, Tennessee law does not have any transaction
12 -- doesn't treat any transaction as one where it's part
13 product, part service. You look at the predominant feature
14 and if the predominant feature is service, the Healthcare
15 Liability Act applies. Thank you.

16 THE COURT: Thank you very much. I will take the
17 papers of all of you. I thank you for the good briefs. I
18 thank you for your indulgence in this rather both truncated
19 and confused hearing. I apologize for that.

20 MR. GIDEON: Thank you.

21 MR. STRANCH: Thank you, your Honor.

22 (Adjourned, 4:42 p.m.)
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C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 69, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In Re: New England Compounding Pharmacy, Inc., Products Liability Litigation.

June 29, 2014
Date

/s/Catherine A. Handel
Catherine A. Handel RPR-CM, CRR